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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 CONVERGENT WEALTH ADVISORS LLC,  
5 Plaintiff,

6 v.

12CV1199(SAS)

7 LYDIAN HOLDING CO., et al.,  
8 Defendants.

9 -----x

10 New York, N.Y.  
11 June 28, 2012  
12 5:00 p.m.

13 Before:

14 HON. SHIRA A. SCHEINDLIN

15 District Judge

16 APPEARANCES

17 LOEB & LOEB  
18 Attorneys for Plaintiff  
19 ALYSON M. WEISS  
20 JOHN PISKORA

21 MILLER & WRUBEL  
22 Attorneys for Defendants  
23 CHARLES R. JACOB III  
24  
25

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(Case called)

THE COURT: I have two letters here, June 20 from Ms. Weiss, saying that she would like to move for summary judgment, and a response June 22 Mr. from Mr. Jacob saying I don't get it, the plaintiff wanted discovery, the plaintiff wanted the discovery schedule to be even longer than the defendants proposed, now the plaintiff wants to leap over the need for all discovery and go right to summary judgment. The defendants' lawyer says this end run is not going to work out, I am going to make a Rule 56(d) request to take discovery anyway if you move for summary judgment which only make the motion get old.

Just a reading of the letters, upon reading the letters, I must say I thought defendants' position made more sense. It seemed like a big switch in position from the plaintiff. Maybe I don't understand what you mean by summary judgment. You have been doing discovery for a reason. I gather the real issue for discovery is what they have to cover, what defendants have to cover, because it depends whether it was pre-contract or post-contract.

MR. JACOB: Pre-closing or post-closing.

THE COURT: Pre-closing or post-closing conduct, and that's not entirely clear and that's one thing discovery would show. But that said, are you funding anything yet.

MR. JACOB: No, we are not.

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1 THE COURT: That's the problem. They are continuing  
2 to incur these expenses and you are not stepping up to the  
3 plate. It could be reallocated after, but you are not funding  
4 anything. You have a duty to defend.

5 MR. JACOB: Can I speak to that, your Honor.

6 THE COURT: Yes. That's why they are fired about  
7 this.

8 MR. JACOB: The underlying arbitration claim has four  
9 counts, causes of action. Only one of them, the fraudulent  
10 inducement claim, even relates at all to pre-closing conduct.  
11 These others are 100 percent post-closing. And most notable as  
12 an example is there is a breach of contract claim on a contract  
13 between the arbitration claim and the plaintiff Convergent  
14 entered into post-closing. So by definition, and the other  
15 claims are similar, that's all post-closing conduct.

16 THE COURT: Given my decision, what is it you have to  
17 cover.

18 MR. PISKORA: I believe under your decision we are  
19 potentially responsible, I say potentially just to cover my  
20 bases because I am speaking on the record, for the fraudulent  
21 inducement claim only and even that I believe can be parsed  
22 more narrowly than just saying it's one claim, it's 25 percent.  
23 We don't think that's the way this arbitration is happening at  
24 all.

25 THE COURT: What does that mean, that the fraudulent

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1 inducement claim which arguably you have to cover because I  
2 said so, might only be 10 percent; is that what you are saying.

3 MR. JACOB: That's what I am saying.

4 THE COURT: But whatever it is, you should be covering  
5 that portion. It could be 1 percent; according to my decision,  
6 you have to cover it, right. Yes.

7 MR. JACOB: Whatever that portion is.

8 THE COURT: Whatever that portion is under my decision  
9 you should be covering it. So why aren't you negotiating some  
10 protocol with the plaintiff now to fund something.

11 MR. JACOB: I think if we were approached with such a  
12 discussion, we would respond to it and have the discussion. My  
13 problem with the letter that was written to your Honor is that  
14 it doesn't say summary judgment as to what exactly and it  
15 doesn't say what kind of evidence they are going to be offering  
16 under Rule 56 to establish the crucial point. In the contract,  
17 your Honor, it's the words to the extent, you quoted it in your  
18 decision, and you also used the words at least in part. We  
19 need to look at that and we need to see how it relates to their  
20 legal fees.

21 We all know, your Honor, I have had cases and I am  
22 sure you have had cases where one count was one of four or one  
23 of ten, but by the time the hearings or the trial arrived, it  
24 was just the tail on the dog and it wasn't so important  
25 anymore. We don't know any of that. We don't know how their

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1 hours billed relate to the various claims, so that's what we  
2 want discovery on. We also think, if I can speak to this  
3 action more broadly, your Honor allowed to stand their claim  
4 for declaratory relief on the indemnity aspect of the case. We  
5 do have a discovery schedule; that is what it is. We entered  
6 into a scheduling order.

7 So we need to have discovery in any event because this  
8 case isn't just about legal fees; it's about their claim for  
9 declaratory relief that you allowed to stand. So, again a  
10 little bit of the puzzlement expressed in my letter to the  
11 court is we set a discovery schedule.

12 THE COURT: I don't think they can get summary  
13 judgment on the indemnification claim.

14 MR. JACOB: No, I don't think that's what they are  
15 looking for, but they didn't really say exactly what they are  
16 looking for.

17 THE COURT: It's not that because it would be  
18 premature. For the record, Ms. Weiss is nodding her head yes.  
19 The indemnification claim is not in play. What they want is  
20 defense costs now.

21 MR. JACOB: My point was only that discovery is going  
22 to need to be taken anyway so why don't we have a schedule.

23 THE COURT: Because they are not getting any funding.  
24 Their fees mounting up and you are not offering anything; you  
25 are not offering to fund a quarter or 10 percent.

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1 MR. JACOB: Then they have to at least start the  
2 process your Honor indicated of presenting us with evidence as  
3 to what extent we should be covering.

4 THE COURT: Maybe they don't agree that it should be  
5 apportioned at all. Maybe they think it should be 100 percent  
6 even though one of the four claims involved pre-closing  
7 conduct. What is your position, Ms. Weiss.

8 MS. WEISS: Your Honor, our position is they should be  
9 funding all of our attorney fees.

10 THE COURT: Why.

11 MS. WEISS: Because there is not a single thing that I  
12 am doing to defend, what I am doing to defend all of the  
13 claims, I would have to do all of that same work anyway to  
14 defend the fraud claim.

15 THE COURT: The fraudulent inducement claim, even  
16 though some of the claims are contract claims that occurred  
17 after the closing.

18 MS. WEISS: All of the claims essentially relate to  
19 the due diligence that was done by my client.

20 THE COURT: Before entering into what, before what,  
21 due diligence before what.

22 MS. WEISS: The alleged misrepresentations on the  
23 fraudulent inducement claims are in part that my client would  
24 do fantastic due diligence on all of these various funds that  
25 the claimants invested in. There is no way to defend the

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1 fraudulent inducement claim without looking at the due  
2 diligence that was actually performed. So, everything I am  
3 doing to defend the fraudulent inducement claim I would be  
4 doing to defend the other claims.

5 THE COURT: I don't understand that because I don't  
6 understand the case. I don't know what you talk about that  
7 occurred post-closing.

8 MS. WEISS: The pre-closing allegations are the  
9 fraudulent inducement claims --

10 THE COURT: I understand that.

11 MS. WEISS: -- which the defendants here have already  
12 acknowledged, I think that's cited in your Honor's decision,  
13 occurred pre-closing.

14 THE COURT: Correct.

15 MS. WEISS: The alleged misrepresentations that  
16 occurred pre-closing relate to the fact that Convergent  
17 allegedly represented that it would do excellent due diligence,  
18 I am paraphrasing, but essentially. And so in order to defend  
19 that fraud claim, we have to delve into the due diligence that  
20 was actually done post-closing as well as whatever was said  
21 pre-closing.

22 THE COURT: That's where I am lost. I don't know why  
23 you think the post-closing claims are not related to the  
24 pre-closing claims; I don't know the facts of this case.

25 MR. JACOB: Your Honor, here are the facts of this

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1 case. In February 2007, there was a person named Steve  
2 Lockshin, who was the CEO of Lydian, the defendant. In  
3 February 2007, he allegedly had this one exchange with the  
4 arbitration claimant in which he made misrepresentations.

5 THE COURT: Sherman.

6 MR. JACOB: Sherman. In March 2007, Lydian and  
7 Convergent go to the contract of sale and at that point,  
8 Mr. Lockshin is going to be leaving Lydian, which he did, and  
9 going with Convergent and he is the CEO or the chairman now I  
10 believe of Convergent. Nothing at all is alleged in the  
11 Shermans' arbitration claim between February and June, and June  
12 is post-closing; the closing was May 7. The Shermans were  
13 never clients of Lydian, never; they were not clients of  
14 Lydian.

15 Mr. Lockshin left. He took the potential clients, the  
16 Shermans, with him as he was entitled to do, and then later  
17 post-closing, Convergent was hired pursuant to a contract with  
18 the Shermans, but they had already left. In other words,  
19 Lydian never got a single dollar from this whole event  
20 involving the Shermans; it all went with Mr. Lockshin to  
21 Convergent.

22 THE COURT: The Shermans are suing Convergent where  
23 Lockshin went.

24 MR. JACOB: Absolutely. The arbitration claim goes on  
25 for 15 pages after February 07 with post-closing events going



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1 into 2009. So with all due respect to Ms. Weiss, the  
2 suggestion that we have to pay all their legal fees for their  
3 customers suing them, where the great majority, we concede not  
4 all, that's why your Honor ruled as you did, but the great  
5 majority of what's complained of is post-closing. The  
6 suggestion that we have to pay all their attorney fees --

7 THE COURT: Where does your duty to pay the defense  
8 costs arise.

9 MR. JACOB: In the purchase and sale agreement.

10 THE COURT: Between whom and whom.

11 MR. JACOB: Lydian and Convergent, there are other  
12 entities but let's just call it Lydian and Convergent, we have  
13 to pay, quote, to the extent, unquote, the underlying claim  
14 arises prior to the closing. To the extent; those are the  
15 words in the contract.

16 THE COURT: What are the exact words.

17 MR. JACOB: They are actually in your opinion.

18 THE COURT: I didn't bring my opinion.

19 MR. JACOB: That's fine. Can I approach.

20 THE COURT: Just read it.

21 MR. JACOB: We agree, quote, to indemnify, defend and  
22 hold harmless the buyer parties from and against --

23 THE COURT: The buyer party, that's Convergent.

24 MR. JACOB: -- reimburse, I am sorry, let me start  
25 again. To, quote, indemnify, hold harmless the buyer parties.

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1 THE COURT: Use the names.

2 MR. JACOB: Indemnify, defend and hold harmless  
3 Convergent from and against and pay, reimburse Convergent for  
4 any and all losses to the extent arising out of excluded  
5 liabilities. Excluded liabilities for this purpose just means  
6 pre-closing. To the extent are the words in the contract. So  
7 we only have to pay their legal fees to the extent their legal  
8 fees relate to the pre-closing claim. That's the only  
9 reasonable interpretation of this contract. But it's also  
10 common sense; this is their customer not our customer. There  
11 is one reference to us.

12 MS. WEISS: If I may, with all due respect, it's  
13 misleading to say, to portray that Mr. Lockshin took the client  
14 from Lydian to Convergent. There was a transaction, pursuant  
15 to which Convergent, pursuant to which Convergent came into  
16 being. Convergent didn't exist until this purchase agreement.  
17 So, Lydian's assets were sold to another entity and then there  
18 was an entity renamed Convergent.

19 THE COURT: Then that entity took action.

20 MS. WEISS: It did; however, the fraudulent inducement  
21 all relates to activities pre-closing and not only relates to  
22 statements made by Mr. Lockshin, who by the way the Lydian  
23 defendant have now asserted a third-party claim against in this  
24 matter, but does not only relate to statements he allegedly  
25 made, but it relates to actual written marketing materials with

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1 Lydian's name all over them that were provided to the Shermans  
2 and which the Shermans --

3 THE COURT: To the Shermans, Mr. Jacob, you provided  
4 written materials to the Shermans.

5 MR. JACOB: That's not clear enough; that's, for  
6 example, one thing we would like discovery on. Lydian doesn't  
7 have these documents anymore; we sold the business.

8 MS. WEISS: We have given that.

9 MR. JACOB: But we want to have formal discovery. We  
10 would like to take Mr. Lockshin's deposition and say did you  
11 give this to them. It's just not enough to have pieces of  
12 paper in a file.

13 THE COURT: Did you give it to them when you were with  
14 Lydian.

15 MR. JACOB: My answer today is I don't know. That's  
16 one of the things I would like to find out. Let me explain  
17 why. The people who --

18 MS. WEISS: I gave you the email transmitting it.

19 THE COURT: She gave you the email transmitting it;  
20 you know the date.

21 MS. WEISS: Of course.

22 THE COURT: It was Lydian then; it's Lydian now.

23 MR. JACOB: It appears that some materials were given  
24 to the Shermans prior to the closing, but let me continue.  
25 There was at least a month after the closing before the

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1     Shermans signed a contract with Convergent to become a client  
2     of Convergent. Then the wrongdoing that's alleged, your Honor,  
3     is really in the performance of the contract. This is one of  
4     these cases --

5             THE COURT: Between the Shermans and Convergent.

6             MR. JACOB: Right. This is one of these cases that if  
7     it were in your court as a securities case, it would be a real  
8     dismissal issue as to the fraud claim because it's really more  
9     of a failure of performance that they said they would vet these  
10    hedge funds and so on but then their performance was defective,  
11    but 100 percent of the performance was post-closing by  
12    definition. So, I don't think it's productive for my opponent  
13    to argue that we have to pay all of their legal fees. We will  
14    look at whatever kind of allocation they want to come to us  
15    with. If they make a summary judgment motion, obviously we  
16    will do what we need to do. But it's not helpful to suggest  
17    that we pay all their legal fees.

18            THE COURT: It doesn't sound it to me either. I don't  
19    think they owe you all the legal fees. I don't buy your  
20    argument that everything you are doing to defend the fraudulent  
21    inducement you would have to do to defend against, you are  
22    Convergent, that you would have to do that to defend Shermans'  
23    claim for what Convergent did months later when Lockshin was  
24    there and Lydian was gone. Lockshin went on and did allegedly  
25    bad things; that is why they are suing.

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1 MS. WEISS: That's actually not a fair statement of  
2 that case at all. The alleged misrepresentations concerned  
3 things like we will only pick funds, hedge funds for you --

4 THE COURT: Who made those; Lockshin.

5 MS. WEISS: But whatever was said or represented in  
6 the written Lydian materials either was or was not true.

7 THE COURT: That's true but those representations were  
8 the fraudulent inducement claim. If after the closing  
9 Convergent was to do certain things and didn't, that's a new  
10 activity.

11 MS. WEISS: If after the closing, if pre-closing  
12 Convergent represented that it was going to do certain things  
13 and didn't --

14 THE COURT: If Convergent represented. Convergent.

15 MS. WEISS: Correct. I mean Lydian.

16 THE COURT: Which do you mean.

17 MS. WEISS: I misspoke. If pre-closing, Lydian  
18 represented that it was going to do certain things, for  
19 example, like only put the Shermans' money into funds that had  
20 a 5-year track record and then it ended up putting their money  
21 in funds that had a 2-year track record --

22 THE COURT: But it didn't end up putting its money  
23 because Lydian was not involved at that point. When the money  
24 was actually invested, Mr. Jacob, you were out of the picture.

25 MR. JACOB: That's correct.

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1 MS. WEISS: It's not like they are two different  
2 companies.

3 THE COURT: It sure is. Lydian sold out to  
4 Convergent; Lydian is gone.

5 MS. WEISS: My point is, your Honor, I don't see how I  
6 would defend a fraud claim without looking at what was actually  
7 represented on the one hand and what was actually done to  
8 determine if (A) what was done was in fact what was  
9 represented.

10 THE COURT: Because if Lockshin is a crook, it depends  
11 where he was when he was acting as one.

12 MS. WEISS: It wasn't even Lockshin; he was chairman.  
13 He was involved in the very beginning and wasn't really  
14 involved later on. That's beside the point.

15 THE COURT: That makes it even less likely. All I am  
16 trying to say is after the sale, if Convergent does bad things,  
17 it's responsible and Lydian is done. I understand the  
18 interaction, but to say it's all on Lydian, no. In fact, that  
19 wouldn't make any sense; it wouldn't make any sense. We can  
20 agree to disagree.

21 MS. WEISS: If, for example, there were only the fraud  
22 claim asserted, no negligence claims.

23 THE COURT: That's right.

24 MS. WEISS: If that were the case, only the fraud  
25 claim asserted, wouldn't I still have to do discovery and

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1 provide documents to the other side in the arbitration at great  
2 cost and expense that show what due diligence was done after  
3 the closing and whether these managers --

4 THE COURT: Due diligence by whom after the closing.

5 MS. WEISS: Whether the due diligence done by  
6 Convergent after the closing was in keeping with the  
7 representations made by Lydian pre-closing.

8 THE COURT: Frankly, I am missing it; I don't see the  
9 connection. If Lydian made misrepresentations, it's a new day  
10 when Lydian's out of the picture and Convergent has bought it,  
11 Convergent has now its own responsibilities.

12 MS. WEISS: But that's not the allegation.

13 THE COURT: Yes, it is exactly the allegation. That's  
14 what I am hearing. If a crook goes from one company to another  
15 and continues acting badly, that's the new company's problem.  
16 It could have been the opposite. This new company could have  
17 said what Lydian did was bad but we are not going to go down  
18 that road anymore, we are going to clean it up; we should have  
19 discovered these or we did discover them and we should have  
20 cleaned it up but we didn't.

21 MS. WEISS: But in this situation Lydian became  
22 Convergent; Convergent didn't even exist.

23 THE COURT: I don't know why you are doing that. Now  
24 you are making a completely different argument. Now it's the  
25 successor liability; now it's the successor corporation.

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MS. WEISS: Convergent was formed --

THE COURT: I understand but it's a sale. He used the word buyer and I said substitute the name Convergent and he did. You have an argument that it's successor company and it's successor liability. That's a new argument. Do some discovery and if you want to win on the point of successor liability, that's a different issue. If it's a different company, there is a break in liability. The actions taken by Convergent are Convergent's problems. Lydian is the seller. If it's an arm's-length sale, it has no responsibility for Convergent, the purchaser, unless it's all a sham and it's really one company and it's really successor liability and they just changed names and Lockshin just goes over, that's a whole new thought.

MS. WEISS: No, your Honor, with all due respect, it's just not the facts of this case. Lydian --

THE COURT: What's not the facts of this case.

MS. WEISS: The way Mr. Jacob represented.

THE COURT: No, maybe what I just said; maybe it was just a name change.

MS. WEISS: It was an assets sale, but Convergent didn't exist.

THE COURT: I know it didn't exist. You want to make an argument it's all the same company, it's really successor liability, that it's a sham transaction.

MS. WEISS: No, I am not suggesting it was a sham



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1 transaction at all.

2 THE COURT: Are you suggesting it's successor  
3 liability.

4 MS. WEISS: I am suggesting there's a fraudulent  
5 inducement claim. Claimants allege that certain  
6 representations were made by Lydian which induced them  
7 according to their allegations to sign.

8 THE COURT: You cannot win every argument you present  
9 to every court in the United States. You are losing this one.  
10 You are losing this one.

11 MS. WEISS: May I --

12 THE COURT: You can not move for summary judgment now.  
13 I am sorry. I would have worked with you but you are not  
14 working with me. We are going to finish discovery. Then make  
15 your motion. I did the best I could. I don't see it your way.  
16 I cannot see that Lydian is responsible for all the claims in  
17 this arbitration. Maybe I will see it at the close of  
18 discovery. Maybe your theories will evolve. It would be funny  
19 if it came right around to what I was saying; so be it. When  
20 you get around to briefing it, I will know more. Maybe some  
21 day you will recoup all your fees. I have no idea. I can't  
22 help you now.

23 MS. WEISS: Your Honor, if I may, all I was wanting to  
24 do here was make a motion for partial summary judgment --

25 THE COURT: Denied.

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1 MS. WEISS: -- so that I could get some peas now. You  
2 acknowledge they owe us something.

3 THE COURT: Make an offer; talk to your adversary.

4 MS. WEISS: We have; they declined.

5 THE COURT: No, you have never presented.

6 MS. WEISS: We had a mediation of the arbitration. We  
7 invited them to attend; they declined.

8 THE COURT: You are too argumentative.

9 MS. WEISS: I apologize; I don't mean to be.

10 THE COURT: I have been in court on and off all day.  
11 I am trying to say to you, if you want some coverage, he owes  
12 you some coverage, negotiate without prejudice to 100 percent,  
13 but say we will take something over nothing at this point,  
14 given the fraudulent inducement claim is what eventually leads  
15 to everything else, we think you should pay X percent now.  
16 Negotiate; see if you get anything. I don't want multiple  
17 summary judgment motions. It's well-established that the court  
18 can control the timing of summary judgment. We can't deny you  
19 the right to do it, but we can decide when and after close of  
20 discovery is the right when.

21 You can move up these dates. You are the one who  
22 argued they should be longer. The schedule that Lydian  
23 originally proposed was shorter. You want it to be longer.  
24 Tighten up the schedule and move immediately after that. Do  
25 what you have to do. I understand. I feel for you. I feel

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1 your pain. You are not getting any coverage and you are  
2 entitled to it. You won the first decision with me.

3 But now what is his obligation. He is saying that's  
4 what discovery is for. So are you because you may find out  
5 things about this transition so to speak that keeps Lydian on  
6 the hook or he might find things out about the transition that  
7 takes him off the hook. That's what briefing is for.

8 MS. WEISS: They already acknowledged they are on the  
9 hook for that one claim.

10 THE COURT: That's true but trying to understand how  
11 that one claim relates to the remainder may depend on deposing  
12 Lockshin or getting a better understanding of documents that  
13 were given to the Shermans, when and by whom. You say it's  
14 right in the emails. We are not going to have partial summary  
15 judgment. You have a couple options. You can negotiate with  
16 your adversary for partial payment. You can tighten the  
17 discovery schedule and send me a proposed reschedule, tighter.  
18 I will probably go along with it. I understand you are not  
19 getting any payment and you should.

20 MS. WEISS: We are not getting a penny.

21 THE COURT: That's right. I understand. You really  
22 should be getting some. I understand that.

23 MS. WEISS: I don't see any way to get it other than  
24 moving for partial summary judgment at least as to the piece  
25 that we all agree they owe us.

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1 THE COURT: You can't quantity it without discovery;  
2 we don't have all the facts. Lockshin has not been deposed.

3 MR. JACOB: Correct.

4 THE COURT: We don't have the facts. I don't know if  
5 all the document stage is done and we are up to depositions.  
6 You can propose a tighter schedule or you can negotiate. Those  
7 are your two options. We will get to summary judgment as fast  
8 as we can. We are only going to get stopped in the middle of  
9 summary judgment when he asks for certain discovery in order to  
10 oppose.

11 MS. WEISS: May I ask, what discovery do you think you  
12 need just for us to adjudicate this issue, because my clients  
13 incurred as you might imagine staggering attorney fees on a  
14 daily basis at this point. We asked them to attend the  
15 mediation; they declined.

16 THE COURT: Was that before or after my decision.

17 MS. WEISS: That was just two weeks ago we had the  
18 mediation.

19 MR. JACOB: We declined before your decision, your  
20 Honor.

21 MS. WEISS: They knew when the mediation was and they  
22 didn't pick up the phone and say we would like to attend.

23 MR. JACOB: I think the question of what discovery is  
24 a very fair question. We would want to take the depositions of  
25 Steve Lockshin, Michael Sherman, whom we understand to be the

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1 primary arbitration claimant. We would like discovery of the  
2 Shermans' trust and estate counsel and the reason for that is  
3 that according to both the statement of claim and Convergent's  
4 pleadings in the arbitration, the structure that was set up,  
5 for the Shermans was a very complex structure devised by the  
6 trust and estate attorneys. There have been allegations by  
7 Convergent in the arbitration that Lydian was involved in that  
8 in ways that we don't think they we were involved in it.  
9 Honestly, the answer is not clear to me today.

10 THE COURT: They say you were involved in how they  
11 structured.

12 MR. JACOB: That allegation has been made to the  
13 arbitrators but we believe it is incorrect, so we want  
14 discovery on that general subject of how these family trusts  
15 were set up to make the investments. That might involve a  
16 deposition of the trust and estate lawyer or maybe we can just  
17 do it with paper discovery, and then --

18 THE COURT: Do you expect an assertion of privilege.

19 MR. JACOB: I am not sure. Ms. Weiss might be able to  
20 address that. I think she subpoenaed them in both proceedings.  
21 You said it was Patton Boggs.

22 MS. WEISS: Are you referring to the allegation that  
23 Lydian company was the trustee, because I will take you at your  
24 word if you tell me it wasn't. We always thought it was;  
25 claimants didn't tell us to the contrary. I will take you at

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1 your word. You would know better than we.

2 MR. JACOB: Lydian has looked and does not understand  
3 how that contention came to be. We do not have any records  
4 that we were ever a trustee to the Shermans.

5 Then last but not least --

6 THE COURT: Are you getting any discovery from this  
7 trust and estate lawyer or has he asserted privilege.

8 MS. WEISS: He has not asserted privilege. We are  
9 going to get some discovery. He moved firms. The firm we  
10 subpoenaed said he took the records with him and the panel  
11 actually ordered the claimants in that case to provide us with  
12 those documents. What I am trying to do here, I don't mean to  
13 be argumentative, it's late in the day, is just figure out what  
14 exact discovery is necessary for me to make this motion.

15 THE COURT: He said he needs Lockshin, he needs  
16 Michael Sherman, and he would like to understand the claim that  
17 Lydian is somehow involved in the structuring of this trust.

18 MS. WEISS: I don't see what that has to do with this.

19 THE COURT: Because it was raised in the arbitration  
20 against Lydian, according to him.

21 MS. WEISS: It's not.

22 THE COURT: Mr. Jacob says so. I wasn't there.

23 MR. JACOB: Obviously we need document production by  
24 Convergent itself concerning the Shermans.

25 THE COURT: They are not done with that.

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1 MR. JACOB: We have gotten a lot of documents. I  
2 don't mean to cast this aspect in a bad light at all. They  
3 provided us with a lot of material from the arbitration itself  
4 which obviously overlaps with this case. It's kind of like a  
5 case within a case. Last but not least --

6 THE COURT: What documents have they not given you.

7 MR. JACOB: I don't understand that they have made a  
8 complete production in response to our document requests.

9 THE COURT: What's missing.

10 MR. JACOB: I don't think we have all emails from  
11 all --

12 MS. WEISS: The response is due tomorrow.

13 THE COURT: You will be getting more.

14 MR. JACOB: We are not there yet.

15 THE COURT: You will know tomorrow.

16 MR. JACOB: There is obviously one last bundle of  
17 issues surrounding the legal fees themselves, your Honor. We  
18 obviously don't want to invade privilege or inconvenience  
19 Ms. Weiss' law firm. We are required as counsel for our  
20 clients to take a look at the legal time spent and come to an  
21 understanding of two things; again, this question of the extent  
22 to which it arises out of a certain claim --

23 THE COURT: There is no agreement on that; they are  
24 going to say and have said here all connected.

25 MR. JACOB: It's just the discovery I need, your

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1 Honor.

2 THE COURT: What discovery; are you going to get all  
3 the time records.

4 MR. JACOB: Yes.

5 THE COURT: With line entries of what they did.

6 MR. JACOB: Well, I think they can waive privilege if  
7 we have a confidentiality order that we will do nothing more  
8 than look at it for this purpose. Look, we want the Shermans  
9 to lose, your Honor. There is an extent to which we are allied  
10 in interest here. We are not going to take discovery material  
11 and use it in any way that advantages the Shermans. But we  
12 have an obligation as counsel to defendants to look at the  
13 legal fees and understand how they were incurred and what they  
14 were for, just like any other legal fees application.

15 THE COURT: It seems to me that comes after your  
16 either agreement to pay them or by order that you pay them.  
17 Then we worry about the amount. We can always bifurcate that.  
18 First comes your obligation to pay them.

19 MR. JACOB: If that's your Honor's ruling, that can be  
20 left for last; we have time, but we need to do the other things  
21 that are outlined.

22 THE COURT: You need Lockshin, Sherman, maybe this  
23 trust and estate lawyer, and the rest of your document  
24 production tomorrow. So, how fast can that be accomplished.

25 MS. WEISS: We can do that as quickly as the



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1 witnesses, they just sued Lockshin and I am not authorized to  
2 appear for him. I may ultimately be.

3 THE COURT: Is he still with Convergent.

4 MS. WEISS: He is, but they sued him personally and I  
5 am not authorized to --

6 THE COURT: He is the CEO of a company you represent.

7 MS. WEISS: That's correct.

8 THE COURT: He's certainly accessible to you.

9 MS. WEISS: That's certainly right. Since he is now a  
10 defendant in his individual capacity, he may have his own  
11 counsel. He may even have an employment agreement with Lydian  
12 that requires them to provide counsel; I have no idea.

13 THE COURT: I have no idea.

14 MS. WEISS: He may have a motion because I believe the  
15 claim against him is as contingent as the one your Honor just  
16 dismissed that we asserted. I just don't know. I don't  
17 represent him.

18 MR. JACOB: The discovery I have outlined is the  
19 discovery relating to the legal fees application;  
20 indemnification is a somewhat broader subject.

21 THE COURT: I realize that. You have an agreement  
22 with Lockshin that what.

23 MS. WEISS: That may have an employment agreement with  
24 Lockshin from his Lydian days that requires them to provide him  
25 with counsel; I have no idea.

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1 MR. JACOB: I don't think it's still in force. I  
2 would need to look at that. I don't think there is anything  
3 that I am aware of that is applicable to this situation,  
4 bearing in mind --

5 THE COURT: Where did you sue him; where is the suit  
6 against him.

7 MR. JACOB: It's a third-party claim.

8 THE COURT: Right here.

9 MR. JACOB: Correct, because if the Shermans are  
10 correct, he committed fraud. He as a result breached his  
11 fiduciary duties; he was an officer of each of the defendants  
12 and has the responsibilities of someone who commits fraud  
13 generally has. We pleaded very clearly saying if the Shermans  
14 are correct, but if they are correct, that's our position.

15 THE COURT: We can bifurcate that. It sounds like you  
16 should be able to come back here in maybe six weeks.

17 MS. WEISS: I would think so; obviously, delay is a  
18 hardship to us.

19 THE COURT: I understand. I do understand. You just  
20 need enough discovery to be able to understand how much or all of  
21 the defenses should be covered. I can't do with it my limited  
22 knowledge now. I will give you another date for another  
23 pre-motion conference. You have to cooperate. Since you have  
24 access, Ms. Weiss, to Lockshin, it's in your interests to make  
25 him available quickly on these issues. I don't know about the

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1 Shermans; they are adversaries to both of you.

2 MS. WEISS: I don't control.

3 THE COURT: I realize that. Mid August. How about  
4 Wednesday, August 15 at 4:30.

5 MR. JACOB: Fine.

6 THE COURT: Hopefully the time by which you should get  
7 the essential discovery done then we can have another premotion  
8 conference and schedule the motion which I think by then I can  
9 allow it. 4:30. OK. If you have a discovery dispute after  
10 you see what Convergent gives you, call my chambers and ask for  
11 an immediate conference. I want to make sure this is ready for  
12 August 15. If anything goes wrong, tell me.

13 MR. JACOB: Understood, your Honor.

14 THE COURT: Thank you.

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